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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-1642

WILLIAM T. FARR,

Petitioner,

vs.

SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

(Sigma Delta Chi, The Times Mirror Company, California Newspaper Publishers Association, Twin Coast Newspapers, Inc., The Hearst Corporation and The Newspaper Guild, AFL-CIO, CLC.)

Amici (appearing by written consent of the parties)[1] represent a broad spectrum of the press, including metropolitan newspapers, small newspapers, and working journalists. They are here united in the belief that grave injury has been done to freedom of speech and press by the proceedings below and most especially by the decision of the California Court of Appeal.

They are moved urgently to support the petition for a writ of certiorari filed on behalf of reporter William

[1]A letter from William F. Stewart, Deputy County Counsel, County Counsel of Los Angeles County (attorneys for respondent Superior Court), and a letter from Mark Hurwitz (attorney for petitioner Farr), authorizing the filing of this amici brief are filed concurrently with the Clerk.

T. Farr in order to protect Mr. Farr from unjust imprisonment, but more importantly in the broader sense, also to preserve the right of the press in California to report free from unwarranted judicial harassment.

Statement of the Case.

1. On December 10, 1969, the Superior Court for Los Angeles County, California, entered an Order Re Publicity in the case of *People v. Manson* (Appendix C), and the effect of that order was to prohibit parties, witnesses, attorneys, judicial attachés or employees, public officials, grand jurors, the chief of police and any sheriff from "releas[ing] or authoriz[ing] the release for public dissemination" of all but minimal information respecting the pending proceedings.

2. This Order Re Publicity paralleled in form court rules proposed by the well-known Reardon Committee.[2] In its report proposing such rules, the Reardon Committee assured the press that, "A vital factor in the Committee's consideration has been its desire not to recommend any steps that would impair the benefits derived from criminal news coverage or abridge the constitutional freedoms of speech and of the press."[3] For that reason, and because the decisions of this Court cast considerable doubt upon the propriety of any such restraints, the Committee did not recommend direct restrictions upon the news media.

3. The President of the American Bar Association, in a speech in New York on January 27, 1967, further emphasized that the rules proposed by the Reardon

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[2]ABA Advisory Committee on Fair Trial and Free Press.

[3]ABA Advisory Committee on Fair Trial and Free Press, Standards Relating to Fair Trial and Free Press (Tentative Draft, Dec. 1966), 68.

Committee "would NOT restrict the press or other news media from disseminating publicly any information the media could develop through their own initiative or resources about crimes committed or about the administration of justice."[4] Justice Reardon quoted this statement with approval in an explanatory article written for the San Diego Law Review.[5]

4. But unfortunately, when any branch of government issues decrees compelling silence, the enforcement of those decrees inevitably leads to ever more draconian measures wholly at odds with the First Amendment.

5. And so here, Judge Older, trial judge in the *Manson* case, became displeased by an article in the Herald-Examiner which set forth information indicating to Judge Older that someone had violated the Order Re Publicity.

6. He thereupon self-initiated an investigation to discover the identity of the speaker who wasn't supposed to speak. The mode of investigation he utilized was to bring in the reporter who authored the story and attempt to extract from him the source of his information. (Appendix A.)

7. The first interrogation resulted in failure because the reporter asserted his protection from contempt under California Evidence Code Section 1070. (Appendix I.) That section provides, in substance, that a reporter may not be held in contempt for refusal to disclose the confidential sources of information procured for publication.

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[4]President Marden, quoted in Reardon, The Fair Trial-Free Press Controversy, 4 San Diego L.Rev. 255, 263 (1967).

[5]Reardon, The Fair Trial-Free Press Controversy, 4 San Diego L.Rev. 255, 263 (1967).

8. But Judge Older discovered, months later, that the reporter had left his former employer and was no longer engaged in reporting the news. Consequently, Judge Older reinitiated the inquiry and again had the reporter Farr brought before him. (Order to Show Cause, Appendix E.)

9. Mr. Farr upheld his responsibilities as an ethical reporter and refused to identify the sources of his article. He was adjudicated to be in contempt of court and ordered to be jailed until he responds to the questions posed and identifies the sources of the information published. [Rep. Tr., Appendix B, pp. 19-53 and 111-149; Findings and Order, Appendix D.]

10. The California Court of Appeal upheld his conviction in an opinion (Appendices F and G)[6] which asserted that California Evidence Code Section 1070 (and presumably all other Evidence Code witness privileges) are inapplicable to contempt proceedings, or at least contempt proceedings initiated by a court pertaining to assumed violation of a "gag order". Thereby, the following proposition was established as the law of California:

> A. A reporter obtaining information confidentially respecting a possible violation of a statute (as well as other matters) is protected from forced disclosure of his confidential sources.
>
> B. A reporter obtaining information confidentially respecting a possible violation of a judicial decree is not protected from forced disclosure of his confidential sources.

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[6]*Farr v. Superior Court* (1971), 22 Cal.App.3d 60, 99 Cal. Rptr. 342.

11. The California Supreme Court denied a hearing (Appendix H) and the decision of the Court of Appeal became final.

In the opinion of amici, these events demonstrate a peculiar insensitivity to freedom of speech and press by an agency of government most alert to this constitutional right when adjudicating the propriety of speech-restrictive activities by the Legislature and Executive. The capstone of these events is, of course, the holding of the California Court of Appeal that the court's activity in promulgating and enforcing its restrictive order is within its exclusive prerogatives, untrammeled by any principle of law not court promulgated.

We submit the following arguments in support of petitioner Farr and respectfully pray that this Court accept this matter for hearing, enforce the rights of Farr and of the public and reverse the contempt conviction.

REASONS FOR GRANTING THE PETITION.

Amici recognize that this Court in *Branzburg v. Hayes,* 406 U.S. ....., denied the existence of a constitutional newsman's "privilege" under the facts of that case to be free from grand jury interrogation respecting the sources of news stories. However, in that same opinion, it was recognized that news gathering is an indispensable function of press operations fully qualifying for First Amendment protection. (Slip opinion pp. 15-16, 41-42.) And, Mr. Justice Powell's concurring opinion stressed that "no harassment of newsmen will be tolerated"; "the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection."

Amici submit that the case of reporter Farr does constitute "harassment" necessitating the protection of this Court. A number of judicial speech-suppressive activities have been combined with synergistic effect to attack press freedom.

First, it must be recalled that the judicial decree (Appendix C) which provided the predicate for the investigation resulting in the contempt adjudication was itself a constitutionally dubious "gag order" proscribing speech respecting the administration of criminal justice. (See *Bridges v. California,* 314 U.S. 252; *Pennekamp v. Florida,* 328 U.S. 331; *Craig v. Harney,* 331 U.S. 367, in the light of *New York Times Co. v. United States,* 403 U.S. 713, and *Organization for a Better Austin v. Keefe,* 402 U.S. 415; see also, *Chase v. Robson* (7th Cir. 1970), 435 F.2d 1059; Free Press-Fair Trial: The "Gag Order," A California Aberration, 45 So.Calif.L. Rev. 51 (1972).) It was a court instigated effort to discover the identity of the speaker "violating" this

decree which led to the Farr interrogation and subsequent contempt adjudication.

Second, the decision of the California Court of Appeal even denies to a reporter faced with interrogation respecting an alleged violation of one of these speech-restrictive decrees the protection of the privilege granted by the California Legislature in Evidence Code Section 1070. No rational reason supports the unequal application of this law depending upon whether violation of a decree or a statute is the subject of the investigation. Assuming, *arguendo*, that the State of California is free to withhold any statutory privilege protecting the constitutionality of news sources, it is not free to grant such a privilege, but withhold it without justification from persons within a single and unitary class—namely, reporters who have obtained information for publication from confidential sources. (See *WHYY, Inc. v. Glassboro*, 393 U.S. 117, applying this principle to tax exemptions.) This limitation upon a State's discretion in granting or withholding a "privilege" is of even greater significance where the grant or withholding of the privilege affects rights of free speech and press. (*Speiser v. Randall*, 357 U.S. 513, respecting the imposition of a loyalty oath requirement upon the obtaining of a property tax exemption.)

Finally, the pursuit of Farr was accompanied by denial of even the appearance of fairness to Mr. Farr in arranging for and adjudicating his contempt. Although no time pressures or other factors compelled immediate action, although Farr had announced in advance his prospective refusal to answer questions respecting his sources, and although months had elapsed since the conclusion of the *Manson* trial itself, Judge Older initiated the investigation into the alleged violation of

the speech restricting decree, conducted an initial interrogation of the reporter, months later summoned the reporter before him again, and then adjudged him to be in contempt. Thus, for all intents and purposes, Judge Older was the prosecutor, complaining witness and trial judge of petitioner Farr. Such procedure violated the principles enunciated by this Court in *Mayberry v. Pennsylvania,* 400 U.S. 455, and *Johnson v. Mississippi,* 403 U.S. 212. The loss by the public of its right to information respecting the administration of justice, not to mention the loss by petitioner Farr of his rights of freedom of speech and of personal liberty, must not result from such a proceeding.

Conclusion.

The California courts have erected a double standard in free speech cases, one for the legislative and executive branches of government, quite another for the judicial branch of government. The decision below, if permitted to stand, reveals the bankruptcy of the assurances given by the Reardon Committee and the President of the American Bar Association that restrictive orders apply only to lawyers and others within the control of the court and should not concern the press. That proposition was never true, since restrictive orders dry up the source of news; however, the decision below has dramatically exposed that the enforcement of restrictive orders is indeed to involve the press through the technique of interrogation of its representatives, and is to include the imprisonment of reporters.

The judicial branch is one-third of government; and it cannot be that one-third of government in the United States is entitled to afford only grudging and limited respect to First Amendment freedoms. Since this branch

of government has declared itself to be "supreme" in interpreting and applying the Constitution, and has thus declared itself free of the checks and balances which restrain other branches of government, it is imperative that the judiciary itself exercise rigorous vigilance to insure that its own conduct abides by the standards it imposes upon others.

If, as must be so, the *Branzburg* decision was not intended to constitute a blank check to lower courts to impede the legitimate functions of news gathering, then the Farr situation must be characterized by this Court for what it is—a serious case of judicial overreaching in violation of the First and Fourteenth Amendments.

Amici respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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